Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In The Matter of **Petition of MCI for Declaratory Ruling that New Entrants Need Not Obtain Separate License or Right-to-use Agreements Before Purchasing Unbundled Elements**	)	**CCB Pol 97-4; CC Docket No. 96-98**

REPLY COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION IN SUPPORT OF PETITION OF MCI FOR DECLARATORY RULING

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2, and Public Notice, DA 97-557, released March 14, 1997, hereby submits its reply comments in the above-captioned matter. In its comments, TRA urged the Commission to declare that new entrants need not obtain separate license or right-to-use agreements as a precondition of purchasing unbundled elements from incumbent Local Exchange Carriers ("ILECs"). Requiring new entrants to engage in protracted and likely contentious negotiations with as many third-party vendors as the ILECs, in their sole discretion, dictate would serve to fortify rather than eliminate, as the 1996 Act requires, the "economic and operational impediments" to competitive entry. TRA thus repeats its request that the Commission issue a Declaratory Ruling stating that new entrants need not obtain separate license or right-to-use agreements as a precondition of purchasing unbundled elements from incumbent Local Exchange Carriers.

Contrary to the opinion of several RBOC commenters, Section 253 of the 1996 Act provides more than ample authority for Commission action here. MCI's Petition seeks redress of an actual, concrete obstacle confronting new entrant carriers in Kansas, Oklahoma and Texas. Through prompt action, the Commission may halt the inevitable escalation of ILEC imposition upon new entrant competitors of the burden associated with obtaining individual license or right-to-use agreements from every third-party vendor who may be designated by an ILEC, an obligation which would be onerous for any carrier. For small business entities, however, such an impediment to obtaining unbundled elements would be potentially crippling.

I.

INTRODUCTION

The Telecommunications Act of 1996 (the "1996 Act"),[1] evidences a strong commitment to the development of new and expanded telecommunications service options and, in particular, recognizes the significant economic and social benefits which will result from the provision of new telecommunications services by small business entities. Pursuant to Section 257 of the 1996 Act, the Commission has been specifically directed to "identif[y] and eliminat[e], by regulations pursuant to its authority under [the 1996 Act] . . . market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services."[2] In furtherance of the Commission's ability to "eliminate market entry barriers", Section 253 of the 1996 Act specifically provides that

[1] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[2] 47 U.S.C. § 257(a).

"[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[3] Section 253 also provides the enforcement mechanism to be utilized by the Commission:

> "[i]f, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission *shall* preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency."[4]

MCI has brought its Petition pursuant to 47 CFR § 1.2 of the Commission's Rules and §§ 251 and 253 of the 1996 Act. That Petition identifies a "requirement" which the State of Oklahoma, acting through the Oklahoma Corporation Commission, has permitted and which will have no other effect than to "prohibit[] the ability of [new entrant carriers] to provide. . . intrastate telecommunications service" in that State. The "requirement" at issue, the inappropriate shifting to new entrants of the obligation to obtain third-party vendor license or right-to-use agreements, is contained at ¶ 6 of Southwestern Bell's Statement of Generally Available Terms and Conditions, presently before the FCC in connection with SBC's Application for "in-region" interLATA authority pursuant to Section 271 of the 1996 Act,[5] and approved by the Oklahoma Corporation Commission through the 2-1 decision of the Oklahoma Commissioners deeming SBC to have satisfied Section 271's "competitive checklist" in Oklahoma.

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[3] 47 U.S.C. § 253(a).

[4] 47 U.S.C. § 253(d).

[5] 47 U.S.C. § 271.

Despite GTE's assertion to the contrary,[6] MCI has indeed identified a "requirement" permitted by a State which implicates the Commission's preemptive obligations pursuant to Section 253. No amount of "procedural foul play" posturing by the ILEC commenters can negate either the Commission's authority, or its obligation, to address MCI's concerns pursuant to Section 253 of the 1996 Act.

II.

ARGUMENT

A. Section 253 Empowers the FCC to Address the Concerns Raised by MCI in its Petition for Declaratory Ruling.

Section 253 of the 1996 Act provides that "after notice and an opportunity for public comment, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement" permitted by a State government which has "the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[7] As TRA noted in its Comments, the necessity of entering into protracted negotiations with potentially each third-party vendor of an incumbent provider will present an insurmountable barrier to entry for many small telecommunications providers. Conditioning the ability to purchase unbundled elements upon the satisfaction of this obligation thus stands in direct opposition to the clearly enunciated goals of both Congress and the Commission, and represents the precise result which Section 253 was enacted to remedy.

[6] Comments of GTE Service Corporation ("GTE"), p. 4.

[7] 47 U.S.C. § 253(d).

The assertions of certain commenters that the relief sought by MCI is available only in a Federal district court action,[8] or that MCI is attempting to "bypass the statutory review process established by Congress,"[9] are without merit. Section 252(e)(6) does provide that "[i]n any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section."[10] Bell Atlantic characterizes MCI's request as a "review" of state arbitration decisions which, in Bell Atlantic's opinion, "lies exclusively in Federal district court."[11] The first sentence of Section 252(e)(6) outlines the parameters of the "exclusive" jurisdiction referred to by Bell Atlantic, and provides that

> In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act.

Bell Atlantic's reliance upon Section 252(e)(5), which describes solely the process by which the Commission is to preempt the State commission's jurisdiction of the particular "proceeding or matter" and "assume the responsibility of the State commission"[12] is misplaced. Commission preemption based upon a State commission's refusal to perform its obligations under Section 252, "within 90 days after being notified (or taking notice) of such failure" is markedly

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[8] Comments of the Bell Atlantic telephone companies and the NYNEX telephone companies ("Bell Atlantic"), p. 2.

[9] Comments of BellSouth Corporation ("BellSouth"), p.2.

[10] 47 U.S.C. § 252(e)(6).

[11] Comments of Bell Atlantic, p. 2.

[12] 47 U.S.C. § 252(e)(5).

different from the broad preemption authority granted the Commission pursuant to Section 253. Section 252(e)(6) thus constitutes no bar to MCI's request for relief here.[13] Further, while TRA agrees with the Public Utility Commission of Texas that "it is entirely appropriate for this Commission to address the issue presented by MCI in this proceeding,"[14] it cannot agree with the PUCT that the Commission is precluded from remedying an identified barrier to entry simply because that barrier may arise within the confines of a State commission's consideration of a Section 252 proceeding.[15]

B. Smaller Carriers Would be Irreparably Damaged if Required to Obtain License or Right-to-Use Agreements from Multiple Third Party Vendors of ILECs

Congress enacted the 1996 Act to speed the advent of a "pro-competitive, de-regulatory national policy framework" which would serve as a solid foundation for the competitive offering of telecommunications services by established companies and new enterprises alike. A constant theme running through the provisions of the 1996 Act is an unmistakable commitment to support the development of new and expanded telecommunications service options. It is precisely because the combined effect of market entry by numerous small service providers will immeasurably advance the advent of a truly competitive, deregulatory national telecommunications environment that the 1996 Act strives to foster and nuture opportunities for small business entry into the telecommunications market. Unfortunately, small business initiatives in the provision of telecommunications services would be severely curtailed

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[13] TRA notes that even those provisions of Section 252 which permit a State commission to establish or enforce other requirements of State law in its review of interconnection agreements (whether adopted by negotiation or through arbitration) and Statements of Generally Available Terms, condition such State commission action upon compliance with Section 253. 47 U.S.C. §§ 252(e)(3), (f)(2).

[14] Comments of the Public Utility Commission of Texas ("PUCT"), p. 2.

[15] Comments of PUCT, p. 2.

by ILEC attempts to shift to new entrants the burden of obtaining third-party authorization prior to purchasing unbundled elements.

The RBOC commenters go to significant lengths to downplay the magnitude of the burden which obtaining separate license or right-to-use agreements as a precondition of purchasing unbundled elements would impose upon new entrant service providers. Their lack of concern for the economic and operational difficulties such a requirement would entail for particularly smaller new entrant competitors merely serves to underscore the antipathy of those entities for the many smaller carriers who will account in large measure for any appreciable advancement toward the "pro-competitive, deregulatory national policy framework" which the 1996 Act seeks to create.

To convince the Commission that MCI's request for relief should not be granted, Southwestern Bell focuses on portraying MCI as "a sophisticated interexchange carrier and CLEC" which "has developed and licensed intellectual property rights for its own use for many years" and then feigns outrage that MCI is requesting "that incumbent LECs ("ILECs") be made responsible for negotiating on its behalf with third parties to acquire intellectual property rights that are needed for its use of the ILECs' network elements".[16] TRA does not dispute that MCI is a sophisticated interexchange carrier and CLEC, or that the carrier may indeed currently possess intellectual property rights for its own use. The relevant issue, however, which SBC deftly evades, is the indisputable fact that the concerns raised by MCI's Petition transcend the individual circumstances of any single new entrant carrier. The ability to obtain unbundled elements is of critical importance to each potential new entrant carrier, especially each new

16 Comments of SBC Communications, Inc. ("SBC"), p. 2.

entrant carrier which emerges from the small business community -- those potential competitors of ILECs least able to survive protracted, forced negotiations with numerous third-party vendors.

GTE's attempt to dissuade the Commission is only slightly less disingenuous. To support its contention that ILECs should be permitted to require new entrants to obtain license or right-to-use agreements directly from third-party vendors, GTE looks to certain portions of the FCC's Second Report and Order, finding comfort, apparently, in the Commission's statement that "[w]hile the incumbent LEC might represent the most expedient source" of network disclosure information which might contain proprietary information, "the incumbent LEC is permitted to refer the competing service provider to the owner of the information to negotiate directly for its release."[17] GTE conveniently neglects to acknowledge the Commission's equally salient comments a mere two paragraphs later:

> Although we recognize that legitimate concerns exist regarding the security of proprietary information, *the potential exists for some incumbent LECs to use such concerns as either a shield against the entry of competitors into their markets, or a sword to hamper the competitor's business operations.* We emphasize that incumbent LECs are required to provide adequate access to even proprietary information if a competing service provider needs that information to make adjustments to its network to maintain interconnection and interoperation.[18]

The small business new entrant carrier is also dismissed by Ameritech, which posits that "[m]any of the interconnectors, on the other hand, would be negotiating on a national basis, perhaps even jointly with other interconnectors, for licenses covering both interexchange and local service. With a vast potential for expanded local operations throughout the country,

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[17] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 (Second Report and Order and Memorandum Opinion and Order), CC Docket No. 96-98, FCC 96-333, ¶ 257 (released August 8, 1996), *pet. for rev. pending sub nom.* People of the State of California v. FCC, Case No. 96-3519 (8th Cir. Sept. 23, 1996) ("Second Report and Order").

[18] Id. at ¶ 259.

interconnectors would have substantial leverage to negotiate favorable terms for their extensive future needs."[19] To the extent Ameritech includes entrepreneurial new entrant carriers within this broad statement, it is attributing to such potential competitors, collectively, a degree of negotiating might which does not currently -- and will not for the foreseeable future -- exist. As Ameritech is no doubt aware, while the number of small businesses providing telecommunications products and services continues to increase, the market share held by these entities continues to decline.[20] Few if any of these small businesses can realistically be expected to command "substantial leverage to negotiate favorable terms" from third-party vendors.

The relatively limited resources of many such potential new entrants will severely curtail the ability of those entities to attain a national presence in the provision of local telecommunications. The majority of TRA's members which have entered the local service arena have chosen to initiate, and later to expand, their local service offerings by entering select geographic markets and tailoring their services to meet the needs of each particular market rather than attempting to create a "one-size-fits-all" local service offering. Indeed, the very nature of the local telecommunications market belies Ameritech's contention that third-party vendors will be assailed by, and unable to withstand, the combined negotiating force of united, nationwide, interconnectors.

None of the commenters which have attempted to justifying ILEC attempts to shift to new entrant competitors the obligation to obtain license or right-to-use agreements from each individual third-party vendor designated by the ILEC has raised any countervailing consideration

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19 Comments of Ameritech Operating Companies ("Ameritech), p. 4.

20 The Annual Report on Small Business and Competition at Appx A; Report of the FCC Small Business Advisory Committee to the Federal Communications Commission, 8 FCC Rcd. 7820 at 7826.

sufficient to warrant continued tolerance of this obligation. The Commission should not countenance this burden, which would impede the ability of new entrant carriers, and small business new entrants in particular, to obtain access to unbundled elements. Permitting ILECs to require potential competitors to expend precious resources to obtain such authorizations, especially in light of the inevitable time delay which the negotiation process would necessarily entail, could make the difference between economic survival and extinction for many such firms. In TRA's opinion, grant of MCI's Petition for Declaratory Ruling would tip the scales in favor of competition, a result entirely consistent with the premises underlying the 1996 Act.

III.

CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association requests that the Commission issue a declaratory ruling clearly stating that incumbent LECs may not require requesting carriers to obtain license or right-to-use agreements as a condition to obtaining access to unbundled network elements.

Respectfully submitted,

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